

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-2030

United States of America,

Appellee,

v.

Troy Kisling,

Appellant.

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Appeal from the United
States District Court for the
District of Minnesota.

[UNPUBLISHED]

Submitted: June 2, 2003

Filed: June 2, 2003

Before HANSEN, MORRIS SHEPPARD ARNOLD, RILEY, Circuit Judges.

PER CURIAM.

Troy Kisling (Kisling) appeals his pretrial detention. Kisling is charged with one count of conspiracy and multiple counts of mail fraud in violation of 18 U.S.C. §§ 371 and 1341 (2000). Finding Kisling posed a risk of flight, after hearing evidence, the magistrate judge ordered Kisling's pretrial detention. On appeal of the pretrial detention order, the district court affirmed.

Kisling requests that we independently assess the merits of his application for release on bail pending appeal. See United States v. Maull, 773 F.2d 1479, 1486-88

(8th Cir. 1985) (en banc). Kisling first contends the magistrate judge and the district court erroneously determined the factual situation suggested pretrial detention. Additionally, Kisling argues the magistrate judge's and district court's opinions were erroneously based upon the wrong burden of proof. Because we agree with Kisling's second contention, we need not evaluate the merits of his application. Therefore, we remand for clarification or further proceedings.

The magistrate judge states three times in the detention order that the government had proved "by preponderance of the evidence" Kisling presents a risk of flight requiring pretrial detention. The statute governing a pretrial detention hearing, however, necessitates a higher standard of proof—clear and convincing evidence:

The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.

18 U.S.C. § 3142(f) (emphasis added).

After reviewing the district court's order, we are unable to determine whether the district judge reviewed the evidence under the appropriate standard. Accordingly, we remand the matter to the district court, which may review the existing record or may order a new hearing based on Kisling's new evidence, applying the clear and convincing standard of proof.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.